

ORIGINAL

WESTERN RESOURCE ADVOCATES



0000106167

Timothy M. Hogan (004567)
ARIZONA CENTER FOR LAW
IN THE PUBLIC INTEREST
202 E. McDowell Rd., Suite 153
Phoenix, Arizona 85004
(602) 258-8850

RECEIVED

2009 DEC 15 P 2:55

AZ CORP COMMISSION
DOCKET CONTROL

Attorneys for Western Resource Advocates

BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

DOCKETED

DEC 15 2009

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

DOCKETED BY

IN THE MATTER OF THE APPLICATION
OF SOLARCITY FOR A DETERMINATION
THAT WHEN IT PROVIDES SOLAR
SERVICE TO ARIZONA SCHOOLS,
GOVERNMENTS, AND NON-PROFIT
ENTITIES IT IS NOT ACTING AS A
PUBLIC SERVICE CORPORATION
PURSUANT TO ART. 15, SECTION 2 OF
THE ARIZONA CONSTITUTION

Docket No. E-20690A-09-0346

**WESTERN RESOURCE
ADVOCATES POST HEARING
BRIEF**

Western Resource Advocates ("WRA") submits the following Post Hearing Brief
in support of the applicant's request that the Commission issue a determination that it is
not acting as a public service corporation when it enters into solar services agreements
("SSA") with public schools, governmental entities and nonprofit organizations.

1 **I. THE PRIMARY CONSIDERATION SHOULD BE WHETHER THERE IS**
2 **A NEED FOR PRICE REGULATION**

3 The facts in this case are not in dispute. The challenge in this case is the
4 application of the law to those facts. Of course, that analysis begins with the Arizona
5 Constitution.

6 The Constitution provides that all corporations other than municipal engaged in
7 furnishing electricity for light, fuel or power are deemed public service corporations.
8 Ariz. Const., Art. 15, § 2. The most significant consequence associated with public
9 service corporation status can be found in Art. 15, § 3. That section requires the
10 Commission to prescribe just and reasonable rates and charges to be made and collected
11 by public service corporations. There is no more intrusive power than the ability of
12 government to establish the prices that can be charged by a company for its products or
13 services.

14 Aside from the requirement that the Commission set rates for public service
15 corporations, the only other constitutionally required duty of the Commission is to
16 ascertain the fair value of the property of every public service corporation within the
17 state. This provision was included in the Constitution so that the Commission might act
18 “intelligently, justly, and fairly between the public service corporations doing business in
19 the state and the general public...” *State v. Tucson Gas Electric Light and Power*
20 *Company*, 15 Ariz. 294, 138 P. 781 (1914). It has long been established that the fair
21 value of property devoted to public use is to be used by the Commission in establishing
22 rates that are just and reasonable. *Phelps Dodge Corp. v. Arizona Electric Power Co-op*
23 *Inc.*, 207 Ariz. 95, 83 P.3d 573 (App. 2004).

24 Therefore, the only mandatory duties conferred on the Commission by the Arizona
25 Constitution require the Commission to establish rates that are just and reasonable and
that are related to the fair value of the public service corporation’s property dedicated to

1 public use. The key question in any proceeding involving a determination as to whether a
2 particular corporation is a public service corporation revolves around whether the public
3 interest demands that the corporation's prices be regulated. "To be a public service
4 corporation, its business and activities must be such as to make its rates, charges, and
5 methods of operation a matter of public concern." *General Alarm v. Underdown*, 76
6 Ariz. 235, 238, 262 P.2d 671, 672 (1953).

7 It is critically important to note that no party to this proceeding cited the need for
8 price regulation as a reason to regulate SolarCity as a public service corporation. Indeed,
9 the light handed regulation recommended by Commission Staff would include price
10 regulation based on a range so broad that virtually any SSA price would fall within the
11 prescribed range.¹ If that's the case, then the legal rationale for regulating Solar City as a
12 public service corporation vanishes. If price regulation is not necessary, then it really
13 does not matter what other reasons might exist for regulating SolarCity as a public
14 service corporation. It is the need for price regulation that triggers the Commission's
15 mandatory authority to denominate SolarCity a public service corporation and regulate its
16 rates.

17 Moreover, all parties to this proceeding agreed that the Scottsdale Unified School
18 District was fully capable of analyzing the impacts of the SSA and making a judgment
19 about whether it was a prudent arrangement for the District. The price ultimately paid by
20 Scottsdale was competitively generated through a bidding process and evaluated by the
21 District as a hedge against future price increases by APS or SRP.

22
23
24 ¹ During the course of the hearing, SolarCity lowered the price below the range
25 previously approved by the Commission. Staff has recommended a revised price range to
accommodate the lower price. See Staff's recommended order in this Docket, December
2, 2009.

II. APPLICATION OF THE TWO-STEP ANALYSIS TO THE FACTS IN THIS CASE

Determining whether an entity is a public service corporation requires a two-step analysis. First, there must be a consideration of whether the entity satisfies the literal and textual definition of a public service corporation in the Arizona Constitution. Second, there must be an evaluation of whether the entity's business and activity are such "as to make its rates, charges and methods of operations a matter of public concern" by considering the eight factors articulated in *Natural Gas Serv. Co. v. Serv-Yu Co-op.*, 70 Ariz. at 237-238, 219 P.2d at 325-26. *Southwest Transmission Cooperative, Inc. v. Arizona Corporation Commission*, 213 Ariz. 427, 430, 142 P.3d 1240, 1243 (App. 2006).

A. Whether SolarCity is Furnishing Electricity for Light, Fuel or Power

Article 15, § 2 of the Arizona Constitution defines a public service corporation as a corporation "engaged in furnishing gas, oil, or electricity for light, fuel, or power..." SolarCity maintains that it is not providing electricity because the SSA specifies that Scottsdale owns the electricity at the instant it is generated. Therefore, according to SolarCity, there is no transfer of electricity from SolarCity to Scottsdale and, therefore, no "furnishing."

It is clear that the decision about whether SolarCity is a public service corporation should not hinge on the agreement between SolarCity and Scottsdale. The function of the transaction should be analyzed to make that determination. Viewed from one perspective, SolarCity is in the business of providing equipment, not electricity. Its business model is to sell or otherwise make available to customers the equipment that is necessary to produce electricity.

Viewed from another perspective, the purpose behind the transaction is for SolarCity to provide electricity to its customers. According to proponents of this view,

1 the evidence supporting it is the fact that Scottsdale acquires no ownership interest in the
2 equipment and is charged on a kWh basis for electricity produced.

3 WRA has taken no position on resolution of this question. WRA acknowledges
4 that Scottsdale and SolarCity cannot decide by agreement whether SolarCity is a public
5 service corporation. At the same time, it doesn't look as if SolarCity is providing
6 electricity to Scottsdale. WRA testified that "looking at how SolarCity structures charges
7 for its service is irrelevant to whether it is a public service corporation. Charging for
8 service tells us nothing about whether a company is a public service corporation -- all
9 suppliers charge for their services, regardless of what industry they are in." Berry, p. 5.

10 The debate about whether SolarCity is "furnishing" electricity does not lead to a
11 conclusion that solar service agreements must be regulated. Instead of focusing on what
12 is being "furnished" under the solar service agreements, it is instructive to assess the
13 essential nature of the transaction in light of the factors considered in *Serv-Yu* and other
14 cases.

15 **B. The *Serv-Yu* Factors**

16 There are eight *Serv-Yu* factors. They act as guidelines for analysis. There is no
17 requirement to find all eight factors to conclude that a company is a public service
18 corporation.

19 WRA provided testimony through Dr. David Berry on the application of some of
20 those factors to the facts of this case, as follows:

21 **1. Dedication to Public Use.**

22 There is no dedication of private property to public use in this case. The public
23 does not use the photovoltaic systems installed on Scottsdale's property. A customer-
24 sited solar energy facility primarily serves only that customer and may only incidentally
25 sell excess generation back to the utility.

1 **2. Dealing with the service of a commodity in which the public has**
2 **been generally held to have an interest.**

3 There is no public interest in customer-sited distributed energy projects. A
4 characteristic of public service corporations is that their activities require governmental
5 control of their rates, charges and methods of operation. There is a long history of public
6 interest in the production and sale of electricity from central station generating resources
7 and in the transmission and distribution of that electricity. However, there is little public
8 interest when an individual customer obtains some of his or her electricity from a
9 generation facility located on the customer's premises. The service affects only the
10 customer on his or her property where the distributed energy project is located. The
11 service is provided primarily for the benefit of the property owner and not for the general
12 public. Therefore, no governmental control of the price and method of operation is
13 required.

14 Further, the service provided by SolarCity is not an essential service. Regulation
15 of public service corporations is intended to preserve and promote those services which
16 are "indispensable to large segments of the population." *SW. Gas Corp. v. Ariz. Corp*
17 *Comm'n*, 169 Ariz. 279, 286, 818 P.2d 714, 721 (App. 1991). While furnishing
18 electricity through a network of generators, transmission facilities, and distribution
19 facilities may be an essential service, a grid connected consumer does not have to obtain
20 solar electric services provided by facilities located on the consumer's premises in order
21 to function. Rather than seeking essential services, that customer could be seeking
22 protection against higher utility rates or seeking energy resources with little or no
23 environmental impact.
24
25

1 **3. Monopolizing or intending to monopolize the territory with a public**
2 **service commodity.**

3 A fundamental reason for regulating the sale of electricity to retail consumers is
4 that the sellers have been considered to be "natural monopolies." In this case, there are
5 multiple companies marketing and supplying distributed generation from renewable
6 energy resources. SolarCity is only one of those companies. Those companies operate in
7 regional, national, or international markets and compete with each other. They are not in
8 a position to monopolize the Arizona market in distributed generation or central station
9 generation and there are no large barriers to entry into the market.

10 **4. Acceptance of substantially all requests for service.**

11 SolarCity is not obligated to serve all potential customers. Its President stated that
12 not every consumer is a suitable candidate for a solar service agreement. For example,
13 some consumers may not have sufficient space in which to install a solar energy system,
14 the site may receive little direct sunlight, a building may not be structurally suitable for a
15 solar energy system, the customer's credit may be unacceptable to SolarCity or any
16 number of other reasons. Moreover, a seller of solar energy services may choose, as a
17 business decision, to market only to certain types of customers such as high income
18 residential customers, builders of new homes, or customers in a particular industry, but
19 not to all potential customers.

20 WRA's witness also considered whether regulation might be appropriate because
21 consumers are ill-informed and need the Commission to make decisions for them (Berry,
22 p. 7). In this case, school district managers, government agencies and other tax-exempt
23 entities are capable of comparing options for distributed energy resources as well as
24 many other inputs into their activities. There is no reason to suppose that they need
25 regulatory assistance in bargaining with competing sellers of distributed energy facilities

1 any more than they need regulatory assistance in bargaining with contractors or other
2 vendors.

3 Several of the *Serv-Yu* factors are less important in this case. The discussion of
4 what the corporation actually does and a review of articles of incorporation is left to
5 SolarCity's witnesses. The factor, "service under contracts and reserving the right to
6 discriminate" is not relevant because it is not controlling and the parties all recognize that
7 SolarCity offers service under contracts. The final *Serv-Yu* factor is "actual or potential
8 competition with other corporations whose business is clothed with the public interest."
9 There is no evidence that "competition might lead to abuse detrimental to the public
10 interest" that could be remedied by rate regulation. *Trico Electric Cooperative, Inc. v.*
11 *Corporation Comm'n*, 86 Ariz. 27, 35, 339 P.2d 1046, 1052 (1959). Moreover, the
12 Commission has either promoted or accepted competition among energy and
13 telecommunications public service corporations, so this factor is an anachronism.

14 **III. THE RATIONALE FOR REGULATING SOLAR PROVIDERS IS WEAK**

15 Staff identified several benefits that would flow from regulating solar providers.
16 However, these benefits would also apply to many other products and services that the
17 Commission does not regulate.

18 First, staff identified the ability of consumers to file complaints with the
19 Commission in the event solar providers are determined to be public service corporations.
20 That's not a reason for regulation, particularly in view of a total absence of complaints
21 about the installation or operation of photovoltaic systems. As the testimony at the
22 hearing indicated, PV systems have been around for a long time and there is no
23 documented history of complaints. In the event complaints do arise, the Attorney
24 General's Office is charged with enforcement of Arizona's consumer fraud statutes and
25

1 the Registrar of Contractors is available to process complaints regarding the installation
2 of PV systems.

3 Staff also cited a concern regarding utility costs that would be stranded as a result
4 of the proliferation of PV systems. It's hard to see this as a reason for regulating solar
5 providers. There may be an impact on utilities associated with decreased consumption of
6 energy by customers but that is the same impact achieved with energy efficiency
7 measures which the Commission does not regulate. Further, it is the Commission's
8 policy to promote distributed renewable energy through the Renewable Energy Standard
9 and Tariff. Any stranded costs could be dealt with when setting rates for incumbent
10 utilities.

11 The Staff also cited a concern that utility companies could provide the same
12 products and services as SolarCity and other solar providers through an unregulated
13 affiliate. It should be observed that no regulated utility has indicated an interest in
14 providing those products and services. Even if they did, there's no reason at this time to
15 conclude that it would be a bad thing. As appropriate, the Commission could consider
16 standards of conduct for incumbent utilities in such cases to avoid cross-subsidization of
17 competitively offered services and to avoid unfair marketing practices by incumbent
18 utilities (such as offering higher incentives for services provided by affiliates than for
19 services provided by third parties such as SolarCity). Notwithstanding the concern of
20 Staff, it is an issue that does not have to be decided in the context of this case.

21 Fourth, the Staff expressed concerns about safety. Electric safety is governed by
22 regulated interconnection agreements with incumbent utilities and by local building or
23 code inspectors. It is highly unlikely that the Commission would inspect electrical work
24 done by solar contractors.
25

1 In sum, Staff's concerns can be addressed with measures that fall short of
2 regulating Solar City as a public service corporation. As the court observed in *General*
3 *Alarm v. Underdown, supra*: "It was never contemplated that the definition of public
4 service corporations as defined by our constitution be so elastic as to fan out and include
5 businesses in which the public might be incidentally interested ..." 76 Ariz. 235, 239,
6 262 P.2d 671, 673.

7 **IV. MEANINGFUL RATE REGULATION IS REQUIRED BY THE ARIZONA**
8 **CONSTITUTION IF SOLARCITY IS A PUBLIC SERVICE**
9 **CORPORATION**

10 The suggestion has been made in this case that some form of light-handed
11 regulation would be applied to solar providers if they were determined to be public
12 service corporations. When it comes to rates, the problem is that there are minimum
13 constitutional requirements that, if properly applied, would subvert a system of light-
14 handed regulation.

15 It has been suggested that a range of rates could be approved by the Commission
16 that is sufficiently broad as to allow virtually any rate agreed upon by the parties to a
17 solar services agreement. In effect, the Commission would permit competitive market
18 rates to replace the rate regulation required by the Constitution. That effort has been
19 previously rejected by the courts as an abdication of the Commission's mandatory duty
20 under the Constitution and the requirement that rates approved by the Commission be
21 linked in some way to the fair value of the utility's property dedicated to public service.
22 *See Phelps Dodge, supra.*

23 WRA does not want to be understood as suggesting solar service providers be
24 subjected to the rigors of Commission rate regulation. Indeed, WRA believes that solar
25 service agreements should not be subject to regulation. It is the rate implications that
flow from a determination that solar providers are public service corporations that argue

1 against such a determination in the first place. No useful purpose is served in making fair
2 value determinations for companies like SolarCity and then purporting to link these
3 determinations of to a range of rates that would be the same for all solar providers.

4 It should be the need for rate regulation that guides the Commission's
5 determination in this case. If there is no need for fair value based rate regulation, then
6 there should be no determination that the entity is a public service corporation.

7 **V. CONCLUSION**

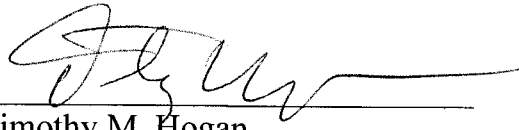
8 WRA recommends that the Commission conclude that when a company uses
9 purchased power agreements for distributed generation from renewable resources, such
10 as solar service agreements, it is not acting as a public service corporation. This
11 recommendation applies to any distributed renewable energy technology and any form of
12 purchased power agreement.

13 The service provided under a solar service agreement has no attributes of services
14 furnished by a traditional public service corporation. There is no dedication of private
15 property to public use, there is no public interest in the service which is provided for the
16 benefit of the customer on whose property the distributed energy system is located, the
17 service is not essential, the market is competitive and is not subject to monopoly pricing,
18 customers are well informed, and there is no obligation to serve all or nearly all requests
19 for service.

20 Lastly, it should be the need for rate regulation that guides the Commission's
21 determination in this case. If there is no need for fair value based rate regulation, then
22 there should be no determination that SolarCity is a public service corporation.
23
24
25

1 RESPECTFULLY SUBMITTED this 15th day of December, 2009.

2 ARIZONA CENTER FOR LAW IN
3 THE PUBLIC INTEREST

4 By 
5 Timothy M. Hogan
6 202 E. McDowell Rd., Suite 153
7 Phoenix, Arizona 85004
8 Attorneys for Western Resource
9 Advocates
10
11
12

13 ORIGINAL and 13 COPIES of
14 the foregoing filed this 15th day
15 of December, 2009, with:

16 Docketing Supervisor
17 Docket Control
18 Arizona Corporation Commission
19 1200 W. Washington
20 Phoenix, AZ 85007

21 COPIES of the foregoing
22 electronically served this
23 15th day of December, 2009 to:

24 All Parties of Record
25